

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 96-526

July 2, 1997

PUBLIC UTILITIES COMMISSION
Amendment of Chapter 280, Provision
of Competitive Telecommunications
Services

ORDER DENYING REQUEST
FOR RECONSIDERATION AND
CLARIFICATION OF JUNE 10
ORDER

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. SUMMARY

On June 23, 1997, NYNEX asked the Commission to clarify and/or reconsider its June 10, 1997 Order Adopting Rule and Statement of Factual Policy Basis in this docket. In this Order we clarify our earlier order and deny NYNEX's request for reconsideration.

II. BACKGROUND

On October 24, 1997, the Commission issued its Notice of Rulemaking in this docket. The rulemaking contained two proposals. One was a comprehensive revision of Chapter 280. The alternative proposal retained the existing access charge structure of Chapter 280 but on an interim basis proposed to reduce the overall level of access charges paid by interexchange providers (IXPs) by 20%. The Notice, in Section IV, explained the rationale for the alternative interim access charge proposal and solicited comments on a number of specific areas related to the proposed change. Because the FCC would soon be issuing its own rules on these topics, the Commission noted that it may be appropriate to change the comment date.

On January 2, 1997, the Hearing Examiner extended the comment deadline until February 24, 1997, at the request of TAM, because the FCC issued its proposed rules on December 24, 1996. After further reviewing the FCC's Notice of Proposed Rulemaking, the Hearing Examiner issued an Order on January 15, 1997, concluding that comments on revising the structure of Maine's access charge should be deferred until June 17, 1997, or a date set in a subsequent order. The Commission continued to seek comments on the alternative proposal and the non-access portions of the proposed rule, setting February 10, 1997 as a deadline for comments. The Office of Secretary of State included notice of the rulemaking and the two subsequent changes to the comment deadlines in its weekly newspaper notice of state rulemakings. Several interested persons submitted comments of the proposed rulemaking, including NYNEX.

On June 10, 1997, the Commission issued its Order Adopting Rule and Statement of Factual and Policy Basis. The Order discussed the comments received and our rationale for adopting the interim access proposal as a rule in section 8(K).¹ The Commission also adopted certain non-access changes to the rule (not at issue in NYNEX's request for reconsideration/clarification). The rule became effective on June 18, 1997. On June 23, 1997, NYNEX asked the Commission to clarify and/or reconsider its Order. On June 25, 1997, the Hearing Examiner issued a Procedural Order inviting interested persons to comment on NYNEX's request. MCI, the Public Advocate, and the Telephone Association of Maine (TAM) filed comments.

III. DISCUSSION OF NYNEX'S REQUEST FOR CLARIFICATION/ RECONSIDERATION

NYNEX asks the Commission to "clarify that its June 10 Order Adopting Rule does not require revisions to NYNEX's tariffs by July 1." NYNEX also suggests that consideration of any such change should be included within the comprehensive resolution under discussion in Docket No. 97-319, *Maine Public Utilities Commission, Notice of Rulemaking/Notice of Inquiry*.

NYNEX makes two principal arguments about why Chapter 280 § K should not be applied to NYNEX. First, it claims that the Commission could only order reductions in NYNEX's rates through an adjudicatory proceeding, not by a rulemaking. Second, NYNEX claims that under the terms of the Alternative Form of Regulation (AFOR) adopted by the Commission in May 1995, changes in NYNEX's rates are solely at NYNEX's discretion within the parameters set out in the AFOR. *Public Utilities Commission, Investigation Into Regulatory Alternatives for the New England Telephone Company d/b/a NYNEX* (May 15, 1995) (AFOR Order). After reviewing NYNEX's request and the comments filed by other persons, we deny NYNEX's request for reconsideration.

NYNEX claims we can only alter rates in an adjudicatory proceeding. NYNEX has read our rulemaking authority too narrowly.² The Maine Administrative Procedures Act governs rulemaking proceedings and defines a "rule" as the whole or part

¹Chapter 280, § 8(K) provides: Notwithstanding any other provisions of this Chapter, Local Exchange Carriers shall reduce the per-minute originating common line charge by 20% no later than July 1, 1997.

²NYNEX has also apparently developed this view recently; its comments to the proposed rule make no such argument.

of every regulation, standard, code statement of policy or other agency statement of general applicability . . . that is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency." 5 M.R.S.A. § 8002(9). Our review of the case law indicates that rates may be established through the rulemaking process. See, e.g., *American Public Gas Association v. FPC*, 567 F.2d 1016, 1064-1067 (D.C. Cir.) cert. denied 435 U.S. 907 (1977) (nationwide rates for sales of natural gas may be established through notice and comment procedure without cross-examination under oath of those making written submissions). In *Cumberland Farms Northern v. Maine Milk Commission*, 428 A.2d 869 (Me. 1981), the Maine Law Court found that "an order setting minimum prices for the sale of milk is, quite precisely, a 'rule' within the meaning of 5 M.R.S.A. § 8002(9)(A): it is a 'regulation . . . that is or is intended to be judicially enforceable and implements . . . or makes specific the law administered by the agency' " *Id.* at 873. The Law Court distinguished the Model State Administrative Procedure Act which expressly includes ratemaking or price fixing as types of "contested cases." The model act uses the term "contested cases" instead of adjudicatory proceeding.

The Maine APA defines an adjudicatory proceeding as a proceeding before an agency in which legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for a hearing. 5 M.R.S.A. § 8002(1). The *Cumberland Farms* case supports the proposition that it is not unlawful to set rates through a rulemaking rather than an adjudicatory proceeding. Therefore, the next question is whether there is a statutory requirement that a proceeding establishing access rates is a proceeding that must be conducted as an adjudicatory proceeding. NYNEX claims that the Commission's authority to examine a utility's rates, charges or practices pursuant to 35-A M.R.S.A. § 1302(3) and 1303, and both sections require adjudicatory proceedings. This is not the Commission's sole authority. As described above, rulemakings can also be used for this process. See also, 35-A M.R.S.A. § 111.

NYNEX also notes a number of procedural infirmities with the rulemaking. We agree that our notices should have included a statement that a hearing was not scheduled but one would be held at the request of five or more persons. 5 M.R.S.A. § 8053(3)(B). We view this omission as an insubstantial deviation from the Maine APA that should not invalidate the rulemaking. 5 M.R.S.A. § 8057. Certainly NYNEX knew it could request a hearing but it never asked for one. NYNEX also complains that we failed to

include the "express terms" of the proposed rulemaking in our notice. The Maine APA requires the express terms "only upon request" as long as the notice otherwise describes the substance of the rule. 5 M.R.S.A. § 8053(3)(D); § 8053(3-A). We believe the language in the October 24, 1996 Notice was clear as to what was being proposed: "The alternative interim plan would retain the current Chapter 280 structure but would immediately reduce the per-minute originating common charge by 20%." Notice at 43 (Oct. 24, 1996).

Finally, NYNEX claims that we cannot order revisions to NYNEX's rates beyond those required by the AFOR. We disagree. Both statutory mandates and our AFOR Order allow us to amend Chapter 280. The statute authorizing the AFOR (35-A M.R.S.A. §§ 9101-9105) requires the Commission to ensure that any AFOR adopted meets nine safeguards. Section 9103(3) requires the Commission to find that the alternative form of regulation preserves the ability of the Commission to ensure that all legislative and commission mandates directed to the telephone utility are properly executed. Section 9103(8) requires the alternative form of regulation to ensure that another telephone utility pays the telephone utility providing local telephone service reasonable and non-discriminatory charges for any service used by the other telephone utility to provide its competing service. As stated in the original AFOR Order, there is nothing in the AFOR that limits the Commission's ability to regulate NYNEX except for restrictions on traditional base rate cases and some provisions relating to increased pricing flexibility. AFOR Order at 13. In addition, the Commission specifically explained, when discussing the mandate to ensure that other telephone utilities pay reasonable and non-discriminating charges for services, that "subject to any change that occurs as the result of a revision of Chapter 280, access charges will be subject to the same price cap rules as toll rates." AFOR Order at 25. NYNEX was on notice that the AFOR provision relating to access were subject to possible changes in Chapter 280.

Our amended rule is also consistent with the Legislature's recent directive that the Commission "establish intrastate access rates less than or equal to interstate access rates established by the Federal Communications Commission, *notwithstanding any other provision of law.*" P.L. 1997, ch. 259 (emphasis added). Our amended rule is the first step toward this access parity.

IV. CONCLUSION

We lawfully adopted changes to Chapter 280 by our Order issued on June 10, 1997. The amended rule became effective on June 18, 1997. The rule requires local exchange carriers, including NYNEX, to reduce per-minute originating common line charges by 20% no later than July 1, 1997. We will allow NYNEX until July 15, 1997 to file tariffs implementing this provision of the rule. The decrease should be effective for service rendered after July 1, 1997. 35-A M.R.S.A. § 309(2).

Accordingly, we

O R D E R

That NYNEX file rate schedules complying with Chapter 280 § 8(K) no later than July 15, 1997, effective for service rendered after July 1, 1997.

Dated at Augusta, Maine this 2nd day of July, 1997.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Hunt

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.